IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.473 OF 2003.

Shima Seiki Mfg. Ltd. ..Petitioner

vs.

Riveira Knitwear Pvt Ltd ..Respondent.

Shri Shyam Diwan with C.S.Kapadia & Ms. Kusum Joshi i/b. M & M Legal Venture for petitioner.

Shri C.J.Balsara i/b. Abhijit Rane i/b. Gagrat & Company for the respondent.

CORAM : S.U.KAMDAR, J.

DATED : 13th January, 2004.

P.C. :

1. The present petition is filed under section 433 and 434 of the Companies Act 1956, I of 1956. Some of the material facts of the present case are as under :

. On 18.2.1997 an agreement was arived at between the petitioner and the respondent company for a supply of machine to the petitioner herein on various terms and conditions which are more

particularly set out in the said agreement. It is admitted position that pursuant to the said agreement the machine was supplied and the delivery of the machine was taken on 4.10.1997. The respondent company has also made part payment from time to time. However, in respect of the balance amount the respondent company sought time to make payment and requested an amendment to the agreement seeking extension of time to make the balance payment. Three such amendments have been effected on 28.1.98, 24.3.2000 and 17.1.2002. Under the aforesid three amendments the respondent company has admitted their liability to make payment and has only sought extension of dates to make the payment of the balance amount. Not only that but when the statutory notice was issued on 1.2.2003 under section 433 and 434 of the Conpanies Act, demanding the payment of the balance amount, the respondent company has in one of its correspondence on 14.3.2003 has stated as under :

"WE HAVE TO PAY YOU STILL TOTAL JAP, YEN 1,93,34,556/-

WE CAN PAY YOU AS UNDER.

FROM 01-01-2004 EVERY MONTH: JAP, YEN 4,00,000
(IN 2004, TOTAL JAP. YEN 48,00,000)

FROM 01-01-2005 EVERY MONTH: JAP, YEN 4,00,000
(IN 2005, TOTAL JAN. YEN 48,00,000)

FROM 01-01-2006 EVERY MONTH: JAP YEN 4,00,000
(FROM JANUARY-NOVEMBER 2006)

IN THE MONTH OF DECEMBER 2006: JAP, YEN 4,59,706

PLEASE NOTE I AM 1 HANDED TRYING TO SURVIVE THE UNIT AND DEFINITELY I NEED YOUR SUPPORT, AS YOU KNOW I WAS FIRST TO ESTABLISH UNIT IN BOMBAY. WE HAVE DEFINITELY PLAYED IMPORTANT ROLE TO CREATE THE FLAT KNITTING CENTRE.

AS YOU ALSO KNOW VERY WELL WHOEVER SET UP SHIMA UNIT IN BOMBAY THEY HAD VISITED OUR UNIT WITH THEIR FINANCIAL INSTITUTION AND NOT ONLY THAT UPTIL NOW WE HAVE ALWAYS TOLD EVERYBODY THAT YOU

AND YOUR TEAM ARE THE NICEST PEOPLE WE HAVE MET."

Inspite of the repeated promises the respondent company did not effect the payment of the balance amount as agreed to and accordingly the petitioner were required to file the present petition on 31.3.2003.

3. The respondent company has filed reply and in reply it has inter alia contended that infact there is nothing due and payable by the respondent company to the petitioner and it is the petitioner who is liable to pay to the company due to defective defective supply of the machinery by the petitioner. The learned counsel for the respondent company has contended before me that infact right from 1998 the company has entered into a detail correspondence indicating that there are defects in the machinery supplied to them and due to the same they are not able to achieve the promised grade and quality of production. The learned counsel for the respondent company also drew my attention to the claim with regard to certain parts of the machinery which were bought

by them for replacement and it was contended that the respondent company spent about Rs.18,32,946/- for the same which they are entitled to recover. A details set out for the aforesaid claims indicate the different dates on which the said parts are purchased commencing from 31.3.1988 to 6.12.2002. The learned counsel has also brought to my attention another statement inter alia raising claim for the service charges paid by the respondent company to the petitioner of about Rs.12,50,000/-, which according to the respondent company were required to be reimbursed to them as inspite of the various technical teams visited the factory premises of the company they could not carry out satisfactory repairs. According to the company thus the said amount of service charges is not due and payable by the company to the petitioner. The learned counsel has also contended that there are other claims pertaining to delay in production and copnsequently delay in supply of material by the respondent company to the suppliers. On the aforesaid basis the learned counsel for the respondent company has contended that there are bonafide disputes and thus present

petition should be dismissed.

4. I have considered the rival submissions of the parties and I am of the opinion that the present case does not raise any bonafide dispute. Nodoubt it is true that there is acorrespondence exchanged as far as back as 1998 pertaining to the alleged deficiency in the machine supplied by the petitioner. However, it is an admitted position that the respondent company has not raised any claim in respect of the defective supply of the machine though the machine is supplied in 1997. In my opinion the claim if any as on today would be barred by law of limitation. It is also an admitted position that the said machine is used by the company right from 1997 i.e. alomost 7 years till now the company never insisted for return of the said machinery due to defects. In that view of the matter the said claim now sought to be raised is belated and after thought with a view to defeat the claim of the petitioner. Apart from the same, I find from the correspondence that there is time and again unqualified and unconditional admission of the liabilities by the

respondent company to make the payment. Even after certain claims were already incurred by the respondent company still the respondent company has admitted its liability to make payment of the entire amount without even seeking any deduction in respect of the so called claim which had already been admittedly crystalised latest by 14.3.2003. I also find that the claim which are made pertaining to the loss of good will and loss of reputation or loss of contract by virtue of non fulfilment of the export is a for fledge remote claim for damages amd even these claims were never raised by initiating any proceedings for recovery of the same and or by claiming any set off or adjustment as against the claim of the petitioner.

5. In the view of aforesaid facts I find that in the present case the respondent company has adopted a double standard i.e. on the one hand claiming that the machinery which is supplied is defective, but on the other hand they continously went on admitting the liabilities to pay the petitioner.

6. In the aforesaid view of the case, I find that the following order shall meet the interest of justice.

i.) On the respondent company depositing a sum of Rs.75,00,000/- in this Court within a period of eight weeks from today, the company petition to stand dismissed and the petitioner will be at liberty to file a suit within four weeks from the date of intimation of such deposit.

ii. If such deposit is made then the said amount be invested in the Fixed Deposit of a Nationalised Bank for a period of three years initially and renew the same from time to time till further orders.

iii. If such a suit is filed, the said amount deposited by the company shall stand transferred to the credit of the said suit. If the petitioner does not file any such suit within time stipulated then the respondent company will be entitled to withdraw the amount forthwith.

iv. In the event of the failure to deposit the said amount by the respondent company, the company petition to stand admitted and the petition shall be advertised in Free Press Journal, Nav Shakti and Maharashtra Government Gazette at the cost of the petitioner. The petitioner shall in addition deposit a sum of Rs.2000/- to the Prothonotary & Senior Master towards the cost of advertisement.

(S.U.Kamdar, J.)